No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WOOSTER DIVISION OF BORG-WARNER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, issued September 12, 1956, denying enforcement of a part of an order issued by the Board against respondent.

OPINIONS BELOW

The opinion of the court below (Appendix, *infra*, pp. 19–34) is reported at 236 F. 2d 898. The findings of fact, conclusions of law, and order of the Board (R. 385a–506a)[1] are reported at 113 N. L. R. B. 1288.

[1] "R" references are to the Joint Appendix filed in the court below, to which have been added the proceedings in that court. Occasional "G. C. Ex." references are to General Counsel exhibits appearing between pages 74a and 77a of the Joint Appendix. However, the references at p. 5 to "G. C. Ex. 5C" and "G. C. Ex. 4" are to portions of those exhibits which were not printed in the court below.

JURISDICTION

The judgment of the court below (Appendix, *infra*, pp. 34–35) was entered on September 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

QUESTION PRESENTED

In the course of bargaining negotiations with the certified bargaining representative of its employees, the respondent Company insisted, as a condition precedent to the execution of any agreement, upon the inclusion of a clause providing that the Union agree not to call a strike or reject the Company's last offer in connection with any dispute under the contract (including the amendment or termination of the contract), except after majority approval of such action in a secret ballot election in which all employees in the bargaining unit, both union and nonunion, are permitted to vote. The National Labor Relations Board found that such a clause was in derogation of the Union's status as certified bargaining representative and was outside the statutory bargaining area of terms and conditions of employment. Accordingly the Board concluded that the Company's insistence on the clause, over the Union's objection, constituted an unlawful refusal to bargain in violation of Section 8 (a) (5) of the National Labor Relations Act.

The question presented is whether the court below, in denying enforcement of the Board's order, erred in

holding that such a clause was not in derogation of the Union's representative status and was not outside the statutory bargaining area.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer * * *

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9 (a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents * * *

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by

either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * * *

STATEMENT

1. *The facts.*—After winning an election among the employees of respondent ("the Company"), the International Union, United Automobile Workers of America, CIO, was certified by the Board on December 18, 1952, as their exclusive bargaining representative under Section 9 of the Act (R. 388a; 31a–34a). On January 23, 1953, the Union presented a proposed agreement to the Company referring to the Union as "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local Union No. 1239, U. A. W.–CIO" (R. 475a; 34a, 154a). On February 9, the Company submitted counterproposals, dealing with so-called noneconomic issues, in which it designated the employees' representative as "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW–

CIO)" (R. 475a; 36a–39a). The Union's representative (Pappin) told the Company representative (Adams) that this provision (the "recognition clause") "violated the certification of the Board" (R. 476a, 392a; 201a).

The Company's counterproposals contained a further clause providing: (a) that, as part of the procedure "for the settlement of all disputes that may arise," all the employees in the bargaining unit, both union and nonunion, would be permitted to vote by secret ballot on whether to accept or reject the Company's "last offer" and "any subsequent offers made"; (b) that the termination of the agreement be among the issues subject to such ballot; and (c) that on issues not subject to arbitration no strike could be called until the settlement procedure (including majority rejection of the Company's "last offer" and "any subsequent offers made") was completed[2] (R. 475a, 390a–392a; G. C. Ex. 5C). The reaction of Pappin, the Union's representative, to this proposal (the "ballot clause") was that he "won't discuss it" because the Union "wouldn't accept it under any circumstances" (R. 476a, 392a; 177–178a, 201a, 319a–320a, 330a–331a, G. C. Ex. 22). There was no further discussion of the ballot clause at any of the eight bargaining conferences held between February 16 and March 11 (R. 206a–207a, 210a).[3]

[2] The Union itself had proposed a ban on strikes over matters subject to arbitration (G. C. Ex. 4, paragraph 45 (b)).

[3] The Union's objections to the Company's recognition clause were reiterated on February 16 and March 4. On the latter

On March 11, the Company submitted its economic proposals as the first part of a "Proposal for Settlement." This economic offer was specifically "made contingent on the satisfactory settlement of all other issues" (R. 394a; 42a, 155a). The following day the Company presented, as "Settlement Proposal—Part Two," its views in support of its noneconomic proposals, including the recognition and ballot clauses, specifying again that "the economic proposal was offered contingent upon settlement of all non-economic issues within the framework of an outline to be presented separately as the second part of the total 'package proposal'" (R. 394a; 49a, 50a–51a, 155a–156a).[4]

Following a Union meeting held on March 15, at which the membership rejected the Company's proposals and approved the executive board's recommendation to call a strike on March 20 if no settlement were reached, Pappin informed Adams at a conference on March 17 that if either the recognition clause or the ballot clause were the only issue in dispute, the employees would strike over either one of them alone, and that the Union would file charges with the Board if the Company insisted on its ballot clause (R. 395a–396a, 404a; 213a–215a, 334a–335a). Further meetings held on March 18 and 19 produced no solution to the dispute, the Company insisting that its last

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date, Pappin told Adams that the Union "could not accept an agreement with only the local union as a party to the agreement" (R. 395a; 209a).

[4] In an open letter to the employees on the same day, the Company again argued its position with respect to its noneconomic proposals (R. 80a).

proposal should be accepted. The Union struck on March 20 (R. 396a; 218a–222a).

The Union's strike bulletin on March 30 listed the ballot clause among the five items constituting "the main points of difference" between the parties (R. 130a–131a). On March 31 and throughout April, the parties continued to meet, the Company remaining adamant notwithstanding the Union's declaration that the ballot and recognition clauses were "fundamental to the settlement of the dispute" and its oft-repeated statements that the Company's insistence thereon could be construed "as a refusal to bargain" and "a violation of law" and that the Union would never accept them "under any conditions" (R. 477a, 397a; 170a–171a, 174a, 176a–178a, 222a, 225a, 226a–227a, 234a–235a, 343a–344a, 345a, 355a, G. C. Ex. 17, 22). On April 7, 1953, the Union filed charges with the Board alleging that the Company was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (5) of the Act (R. 7a). On April 17, the Company extended the applicability of the ballot clause specifically to cover amendment or modification of the contract (R. 477a, 398a–401a; 59a–60a). Finally, on April 21, Pappin asked Adams whether the Company would withdraw its demands concerning the recognition and ballot provisions if the Union acceded to every other proposal of the Company. Adams insisted that the Company's so-called "package" proposal, including the objectionable clauses, be taken "as it is" (R. 477a, 403a; 235a, 324a–325a).

Upon the reluctant recommendation of the International, the membership of the Local instructed its

bargaining committee on April 25 to accept the best offer it could get from the Company and terminate the strike. With the tacit consent of the International, the Local accepted the Company's terms, and on May 5, entered into the agreement proposed by the Company (R. 478a, 405a; 307a–309a, 360a–362a, 363a–364a). On June 1, 1953, the Union filed with the Board an amended charge supplementing its original charge and reaffirming its allegation that the Company had engaged in unfair labor practices within the meaning of Section 8 (a) (5) (R. 9a).

2. *The Board's decision and order.*—Upon the foregoing facts, the Board (two members dissenting) found in relevant part that the Company "was not merely proposing its recognition and employee ballot clauses as matters which the Union could voluntarily accept or reject," but that it "was adamantly insisting on the inclusion of these two clauses as a condition precedent to the execution of any agreement" (R. 478a). It concluded that such insistence was incompatible with the Company's bargaining obligation under the Act and constituted a refusal to bargain within the meaning of Section 8 (a) (5) of the Act.

The Board held that "the Respondent's liability under Section 8 (a) (5) turns not upon its good faith, but rather upon the legal question of whether the proposals are obligatory subjects of collective bargaining. For, if the proposals are permissible statutory demands, the Respondent was priviliged to adamantly insist upon bargaining as to them and the Union could not refuse to so bargain; on the other hand, if they were not, the converse is true" (R. 478a). To

hold otherwise, said the Board, "means, in effect, an amendment to the Act's statement of the required subject of collective bargaining and that [the Union is] required under the Act to bargain about matters wholly unrelated to wages, hours, and other conditions of employment" (R. 479a–480a).

Turning to the two clauses in question, the Board held that fulfillment of the duty "to accord exclusive and unequivocal recognition to the statutory representative * * * is not a subject of obligatory bargaining," and that the Company's recognition clause failed to accord such recognition since it was "in complete derogation of the certificate" which the Board had issued only a few months earlier (R. 480a–481a).

The Board also held that the Company's proposed ballot clause, which prohibited the Union from calling a strike or from amending, modifying, or terminating the agreement without the approval of a majority of the employees, both union and nonunion, was not "an obligatory subject of collective bargaining," but rather a purely internal union matter unrelated to any condition of employment. In the Board's view, the ballot clause represented, in substance, an attempt to resolve economic differences by dealing with the employees as individuals. As the Board stated:

> In principle, there is little, if any, difference between an employer taking individual proposals directly to the employees and an employer requiring that the bargaining representative obtain approval or disapproval of any economic proposal as a condition precedent to the representative's exercise of statutory powers. Either situation is in derogation of the

status of the statutory representative and thus violates the exclusive representation concept embodied in the Act. [R. 482a–485a.]

Based upon the above findings and conclusions, the Board's order in relevant part directs the Company to cease and desist from insisting in bargaining negotiations upon its recognition and employee ballot proposals, or any other proposals not involving terms or conditions of employment. Affirmatively, the order directs the Company to bargain with the certified union upon request, and to post the usual notices. (R. 860–862, 874–875.)

3. *The Court of Appeals decision.*—In relevant part, the Court of Appeals upheld the Board's decision with respect to the Company's insistence upon its recognition clause, holding that representative status "is acquired by statute and is not within the area of collective bargaining" (*infra,* p. 27). The court, however, disagreed with the Board's decision regarding the ballot clause and set aside that part of the Board's order enjoining the Company from insisting in collective bargaining negotiations on the proposed employee ballot clause.

The court, in agreement with the Seventh Circuit's decision in *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board,* 213 F. 2d 374, concluded that the ballot clause was a statutory subject of bargaining, insistence upon which was valid in the absence of bad faith. Noting that the area of compulsory bargaining is a continually expanding one, and that the Board concedes a no-strike clause to be within it, the court held that "the qualified no-strike proposal of

the Company should not be classified differently"[5] (*infra*, p. 25).

REASONS FOR GRANTING THE WRIT

The decision of the court below, essentially in conflict with decisions of the Courts of Appeals for the Fourth and Fifth Circuits, constitutes in the Board's view a serious and unjustifiable departure from the fundamental principle that an employer, to fulfill his bargaining obligation under the Act, must extend full and unqualified recognition to the labor organization which has been designated by his employees as their exclusive representative.

1. Sections 8 (a) (5) and 9 (a) of the Act (*supra*, pp. 3–4) explicitly confer upon an employees' bargaining representative full and exclusive authority to speak and act for such employees in matters pertaining to the bargaining relationship. Acknowledgement of this authority is implicit in the employer's statutory duty to recognize its employees' representative. Thus, it is settled that to permit an employer "to go behind the designated representatives, in order to bargain with the employees themselves," even at the invitation of the employees, "would be subversive of the mode of collective bargaining which the statute has ordained * * *." *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684, 685. It

[5] The court below enforced, as modified, other portions of the Board order and remanded the case to the Board for further findings with respect to other phases of the Board's order. No issue is presented here with respect to the court's disposition of these other matters.

necessarily follows that the requirement of full recognition is not met where an employer refuses to accept the representative's decision as determinative of the employees' position on certain aspects of the bargaining relationship, but instead demands that the employees speak for themselves.

The decision of the court below would permit just such a restriction on an employer's recognition of a bargaining representative. The ballot clause would, in the final analysis, enable the Company to deal with the employees themselves, rather than with their representative, with respect to every dispute arising under the agreement (as well as the termination and modification of the agreement) and with respect to the appropriate means of resolving those issues. Under the clause, it would not be the Union but the employees themselves who would pass upon the Company's offer. And under that clause, it would not be the Union but the employees themselves who would decide whether to strike in order to compel the Company to recede from its position. Of course, it is not unusual for a union to call for an employee vote on whether to strike or not, but this is a matter relating to the internal affairs of the union *vis-a-vis* the employees.[6] The proposal here in question would in effect eliminate the Union from exercising any effective

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[6] Peterson, *American Labor Unions* (1952) 155, 173; U. S. Department of Labor, Bureau of Labor Statistics, *Strike-Control Provisions in Union Constitutions*, 77 Monthly Labor Review 497, 498 (May 1954); tional Industrial Conference Board, *Unions' Strike Vote Provisions*, 16 Management Record 186, 188 (May 1954).

control over the utilization of strike sanctions.[7] The Company's proposal, therefore, detracted from the Union's status as sole bargaining representative because "[a]ny authority to negotiate derives its principal strength from a delegation to the negotiations of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337–338.

In ruling that the Company might insist upon its ballot clause as a condition of agreement, the court below held in substance that an employer fulfills his bargaining duty even though he compels the bargaining representative to surrender, as the price of agreement, the authority and discretion lodged in it by virtue of its representative status. In short, the ruling below compels the Union to bargain over its right to full representative status, notwithstanding its statutory certification, and to reacquire at the bargaining table what the Union won through the Board's election processes. Such a conclusion cannot, we think, be squared either with the statutory scheme of collective bargaining or the decisions of this Court. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 383–384; *National Licorice Co.*

[7] In this connection, it is noteworthy, as the Fourth Circuit observed in *National Labor Relations Board* v. *Darlington Veneer Co.*, 236 F. 2d 85, 88, that Congress when it amended the Act in 1947 rejected a proposal for a referendum on the employer's last proposal before a strike could be called. See also *International Union* v. *O'Brien*, 339 U. S. 454, 458.

v. *National Labor Relations Board*, 309 U. S. 350, 358; see also *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751 (C. A. 7), certiorari denied, 313 U. S. 565; *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 403 (C. A. 2), certiorari denied, 347 U. S. 953.

2. It is now settled that a party, in the absence of bad faith, may properly condition agreement upon a matter relating to "terms and conditions of employment," the area of bargaining provided in the Act (Sections 8 (a) (5), 8 (d), 9 (a)). See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 407, 409. On the other hand, it is equally well settled that a party, regardless of motive, may not condition agreement upon a matter outside that area.[8]

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[8] See *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 36, 38 (C. A. 3) (employer's insistence that union attempt to organize employer's competitor); *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811, 812–813 (C. A. 5), certiorari denied, 342 U. S. 824 (insistence that union register under Georgia law so as to be suable); *Eppinger & Russell Co.*, 56 N. L. R. B. 1259 (cited with approval in *Hill* v. *Florida*, 325 U. S. 538, 542) (insistence that union obtain Florida license); *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291, 292 (C. A. 4) (employer's insistence that union withdraw pending charges); *National Labor Relations Board* v. *H. G. Hill Stores*, 140 F. 2d 924, 925–926 (C. A. 5) (same); *American Laundry Machinery Co.* v. *National Labor Relations Board*, 174 F. 2d 124 (C. A. 6), enforcing 76 N. L. R. B. 981, 982–983 (same). Cf. *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680–681 (C. A. 6), certiorari denied, 308 U. S. 568 (insistence that union bargain through a local); *National Labor Relations Board* v. *Aldora Mills*, 180 F. 2d 580 (C. A. 5), enforcing 79 N. L. R. B. 1, 2 (same); *National*

The Company's ballot clause here did not relate to "terms and conditions of employment" within the meaning of the Act. Rather, the ballot clause was an attempt by the Company to dictate to the employees and their chosen representative the mechanics to be utilized in making the decision as to whether to accept the employer's proposals and whether to go out on strike. As pointed out *supra*, pp. 12–13, the condition thus insisted upon by the Company sought to intrude upon the internal affairs of the bargaining representative *vis-a-vis* its constituency and to derogate from the union's status as exclusive bargaining representative. Such a proposal, in the Board's view, is outside the sphere of compulsory bargaining. The reliance of the court below upon the conceded

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Labor Relations Board v. *Taormina Co.*, 207 F. 2d 251, 254 (C. A. 5) (insistence that union secure consent of parent federation); *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. 2d 713, 719 (C. A. 3) (insistence that union's name be omitted from agreement); *Madden* v. *International Union, etc.*, 79 F. Supp. 616, 619 (D. D. C.) (holding that a union may not insist that the employer representative be other than the one chosen because the latter was "hard to bargain with" and the union did not like its "attitude").

For other decisions dealing with the scope of "terms and conditions of employment," see, *e. g.*, *National Labor Relations Board* v. *Black-Clawson Co.*, 210 F. 2d 523, 524 (C. A. 6) (profit sharing); *National Labor Relations Board* v. *Lehigh Portland Cement Co.*, 205 F. 2d 821, 823 (C. A. 4) (employee housing); *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 249–255 (C. A. 7), certiorari denied, 336 U. S. 960 (pension plan); *W. W. Cross & Co.* v. *National Labor Relations Board*, 174 F. 2d 875, 877–878 (C. A. 1) (group insurance); *Richfield Oil Co.* v. *National Labor Relations Board*, 231 F. 2d 717, 722–724 (C. A. D. C.), certiorari denied, 351 U. S. 909 (stock purchase plan).

propriety of an employer's insistence upon a no-strike commitment by a union during the life of a contract is misplaced. It is one thing for the employees acting through their representative to waive the right to strike; it is a wholly different matter for the employer to insist that the agreement permit the employees to do so independently of their bargaining representative.

3. The decision below cannot be reconciled with the decision of the Fourth Circuit in *National Labor Relations Board* v. *Darlington Veneer Co.*, 236 F. 2d 85, and that of the Fifth Circuit in *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344.

In *Darlington Veneer*, the employer insisted that the collective bargaining agreement should become effective only after ratification by a majority of the employees as determined in an election. The Fourth Circuit held that, "By insisting on the ratification clause, the company was attempting to bargain, not with respect to wages, hours or conditions of employment, but with respect to the authority of the duly certified representative of the employees to represent them, a matter fixed by statute," and that "insistence upon such provisions as a condition of entering into any agreement is so unreasonable when objected to by the other party as to furnish of itself a sufficient basis for the finding by the Board of failure to bargain in good faith; * * *." 236 F. 2d at 87, 88.[9] The Fourth Circuit added (236 F. 2d at 88):

[9] Cf. *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C. A. 5), certiorari denied, 342 U. S. 824.

> We are not impressed by the argument that these clauses are a proper means of giving a voice to minority groups of employees. The purpose of collective bargaining is to fix wages, hours and conditions of work by a trade agreement between the employer and his employees. *N. L. R. B.* v. *Highland Park Mfg. Co.*, 4 Cir., 110 F. 2d 632, 638. This can be done satisfactorily only if a bargaining agent is selected to represent all the employees with full power to speak in their behalf. The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all the misunderstandings and cross currents that would inevitably arise in an election of that sort. [Footnote omitted.]

In *Corsicana Cotton Mills, supra,* the employer insisted upon a contract clause requiring the union to give all employees an opportunity to attend union meetings and providing that "no decision of the Union as bargaining agent shall be determined except upon a majority vote of all employees who attend such a meeting." The Fifth Circuit concluded, contrary to the decision below, that by such insistence the employer had "withheld recognition from the union as bargaining agent." 178 F. 2d at 347.[10]

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[10] The court below, which decided the instant case on September 12, did not advert to the *Darlington* case, decided on August 20. However, the court below sought to distinguish *Corsicana* on the ground that there the employer sought to condition the effectiveness of the entire contract on employee ratification while here the employees, under the employer's proposal, "are permitted to express their views on only one phase

CONCLUSION

For the purpose of resolving this conflict between circuits, and because of the importance of the question presented in the administration of the Act and to both employers and unions in the practical conduct of collective bargaining negotiations, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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DECEMBER, 1956.

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of the contract which was a matter of such vital importance as to justify an expression of their views" (*infra*, p. 27). The distinction is not one of principle. The representative's exclusive authority encompasses not only the negotiation, but also the administration of collective bargaining agreements, and there is no logical basis, in this context, for drawing a distinction between the two.

APPENDIX

1. Opinion Below

In the United States Court of Appeals for the Sixth Circuit

Nos. 12687, 12730

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WOOSTER DIVISION OF BORG-WARNER CORPORATION, RESPONDENT

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

AND

WOOSTER DIVISION OF BORG-WARNER CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided September 12, 1956

Before MARTIN, MILLER and STEWART, *Circuit Judges*

MILLER, *Circuit Judge*. These cases are before the Court upon a petition by the National Labor Relations Board for enforcement of its order against the

respondent Wooster Division of Borg-Warner Corporation, hereinafter called the Company, and upon a petition by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, (UAW-CIO), hereinafter called the International or the Union, to review and set aside so much of the order as dismissed the complaint against the Company. The Company, which is an unincorporated division of Borg-Warner Corporation is engaged at Wooster, Ohio, in the manufacture and sale of fuel and hydraulic pumps. Jurisdiction of the proceedings under Section 10 (e) and (f) of the National Labor Relations Act is conceded.

Following an intensive election campaign, the Board on December 18, 1952, certified the Union as the exclusive representative of the Company's Wooster employees. On January 23, 1953, the Union presented a proposed agreement to the Company which referred to the Union as "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local Union No. 1239, UAW-CIO." The Company submitted counter proposals on so-called noneconomic issues to the Union on February 9th in which it designated the employees' representative as "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)." The Union's representative told the Company representatives that this provision violated the certification of the Board.

This counter proposal of the Company also provided that on issues not subject to arbitration no strike could be called unless a majority of the employees in the bargaining unit, both union and non-union, voted by secret ballot on whether to accept or reject the Company's last offer or any subsequent offer. The Un-

ion's representative stated that he would not discuss this ballot proposal because the Union would not accept it under any circumstances.

Bargaining conferences were held during February and March. The Union's proposals were substantially the same as were contained in an agreement which it had secured for employees at the Cleveland Pesco Division of Borg-Warner Corporation. The Company submitted its economic proposals on March 11th. They were not satisfactory to the Union. On March 14, the Union distributed among the employees a document showing under 21 separate headings the difference between the Company's offer and the provisions of the Pesco agreement. A strike at the plant was called if no solution of the overall issue was reached by March 20th. There were bargaining conferences on March 17, 18 and 19 without reaching an agreement. At the meeting on March 19, the Union submitted a counter proposal covering thirty issues still in dispute. The Company took the position that its last proposal should be accepted and no agreement was reached. The strike commenced on March 20.

Bargaining continued during April. The Company made a final proposal to change the name of the representative to "Local Union 1239 of United Automobile, Aircraft and Agricultural Implement Workers of America." The Union countered with an offer to make its name read "The International, Local 1239." No agreement was reached, the Union insisting that the International be the primary party and the Company insisting that the primary party be the Local. The Company also refused to recede from its insistence upon the employee ballot proposal. On April 21, the Union asked the Company if it would withdraw its demands concerning the recognition and employee ballot provisions if the Union acceded to all the other

proposals of the Company. The Company representative stated that the Company thought its proposal was fair and that it should be taken "as it is."

On April 25th, the International recommended that the employes accept the best offer they could get from the Company and return to work. On May 5th, a collective bargaining agreement retroactive to March 20th was entered into between the Local and the Company, which recognized the Local as the exclusive bargaining agent and contained the disputed employee ballot proposal.

The Union filed its initial charge on April 7, 1953. Following hearings and the Intermediate Report of the Trial Examiner, the Board, with two of its members dissenting, held that the Company did not propose its recognition and employee ballot clauses as matters which the Union could voluntarily accept or reject, but adamantly insisted upon the inclusion of these two clauses as a condition precedent to the execution of any agreement; that its liability under Section 8 (a) (5) turned not upon its good faith, but rather upon the legal question of whether the proposals were obligatory subjects of collective bargaining; that the Company was obligated to accord exclusive and unequivocal recognition to the statutory representative and that its insistence upon making the Local not only a party to the agreement but the only party empowered to represent the employees was in complete derogation of the certificate; that the employee ballot proposal was simply an attempt to resolve economic differences at the bargaining table between an employer and the statutory agent by dealing with the employees as individuals, which was in derogation of the status of the statutory representative and violated the representation concept embodied in the Act. It held that the Company by adamantly in-

sisting upon the inclusion of its proposed recognition and employee vote clauses as a condition to the execution of any contract refused to bargain in violation of Section 8 (a) (5) of the Act.

The Board also held that the Company had interfered with its employees in violation of Section 8 (a) (1) of the Act by soliciting them to abandon the Union and return to work, and by having advised the strikers that they would be, and were, deemed to have quit their jobs by failing to return to work by April 20th.

The Board held, however, contrary to the Trial Examiner, that the strike resulted from the parties' failure to reach agreement on the economic issues in dispute, and was not attributable to the Company's insistence on its recognition and employee ballot proposals. It was accordingly not an unfair labor practice strike entitling the strikers to reinstatement as a matter of right. It dismissed so much of the complaint as charged the Company with refusing to reinstate any employee in violation of Section 8 (a) (3) and (1) of the Act. The Union seeks a review of this ruling.

The Order, enforcement of which is now sought by the Board, directed the Company to cease and desist from (1) refusing to bargain collectively with the Union; (2) insisting upon the recognition of a union other than the statutory representative and insisting upon employee ballot proposals, or any other proposals not involving conditions of employment; (3) soliciting or threatening with loss of employment the striking employees; and (4) in any other manner interfering with its employees in the exercise of their rights under the Act. It affirmatively directed the Company to bargain collectively with the Union with respect to rates of pay, hours, and other conditions of

employment, and if an understanding was reached, embody such understanding in a signed agreement.

The Board in its ruling takes the position that the Company's liability to bargain collectively under Section 8 (a) (5) of the Act turns not upon its good faith, but rather upon the legal question of whether the proposals are obligatory subjects of collective bargaining under the statute. It recognizes that if the proposals are permissible statutory demands, the Company was privileged to adamantly insist upon bargaining as to them, provided the bargaining was conducted in good faith. *N. L. R. B.* v. *American National Ins. Co.*, 343 U. S. 395, 404 * * *; *N. L. R. B. v. United Clay Mines Corp.*, 219 F. (2d) 120, C. A. 6th. On the other hand, it contends that the proposals are not within the statutory subjects of bargaining, namely, "wages, hours, and other terms and conditions of employment" (Sec. 8 [d] of the Act), and that the Company's insistence upon them to the point of impasse, even though in good faith, made the action illegal per se. *N. L. R. B.* v. *P. Lorillard Co.*, 117 F. (2d) 921, C. A. 6th; *N. L. R. B.* v. *Taormina*, 207 F. (2d) 251, C. A. 5th; *N. L. R. B.* v. *Dalton Telephone Co.*, 187 F. (2d) 811, C. A. 5th, cert. denied, 342 U. S. 824 * * *; *N. L. R. B.* v. *Corsicana Cotton Mills*, 178 F. (2d) 344, C. A. 5th.

In *Allis-Chalmers Mfg. Co.* v. *N. L. R. B.*, 213 F. (2d) 374, 376, C. A. 7th, the Court held that if the strike vote clause in that case was included within the statutory subjects of bargaining the employer was permitted to insist upon its position with respect thereto, provided the bargaining was conducted in good faith, but if it was not included within the statutory subjects of bargaining it could not be insisted upon by the employer to the point of creating an impasse in the negotiations. The Court, however ruled, contrary to the ruling of the Board in this case,

that the strike vote proposal fell within the statutory subjects of bargaining about which the employer had the right to bargain in good faith. We are in accord with that ruling, without attempting to pass upon the correctness of the Court's statement with respect to a situation where a proposed clause is not within the statutory subjects of bargaining. The bargaining area of the Act has no well defined boundaries; the phrase "conditions of employment" has not acquired a hardened and precise meaning. Management and labor are now being required to bargain collectively about issues which formerly were not considered as proper issues for inclusion in the usual collective bargaining agreement. *Inland Steel Co.* v. *N. L. R. B.*, 170 F. (2d) 247, 251, C. A. 7th (retirement and pension plans), *W. W. Cross & Co.* v. *N. L. R. B.*, 174 F. (2d) 875, C. A. 1st (group insurance program), *Richfield Oil Corp.* v. *N. L. R. B.*, 231 F. (2d) 717, C. A. D. C. (stock purchase plan), *N. L. R. B.* v. *Niles-Bement-Pond Co.*, 199 F. (2d) 713, C. A. 2nd (Christmas bonus), *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 205 F. (2d) 131, 136, C. A. 1st, (Check-off proposal). The area of compulsory collective bargaining is obviously an expanding one. The Board concedes that a no-strike clause is within the area. *N. L. R. B.* v. *American National Insurance Co.*, supra, 343 U. S. at p. 408 * * *, note 22. The qualified no-strike proposal of the Company should not be classified differently. *Allis-Chalmers Mfg. Co.* v. *N. L. R. B.*, supra. In our opinion, the strike ballot proposal was within the area.

The Board contends that to permit an employer "to go behind the designated representatives in order to bargain with the employees themselves" would undermine the representative status of the Union contrary to the provisions of Section 9 (a) of the Act * * * which

provides that the representatives selected by the majority of the employees "shall be the exclusive representatives of all the employees" in the bargaining unit. *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 684, 685, 687 * * *; *May Department Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, 383–384 * * *. In *Medo Photo Supply Corp.* v. N. L. R. B., the Court held that orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, even though the employees asked that the designated representatives be disregarded; that the duty of the employer to bargain collectively with the chosen representatives of his employees also involves "the negative duty to treat with no other." In that case, however, the attempt to go behind the designated representatives was without the consent of the representatives. In the present case, there was no attempt to bargain with the employees instead of the designated representatives. The Union was at all times recognized as the exclusive representative of the employees; the bargaining was done with it, not with the employees. Any requirment that the employees approve the action of the Union would be the result of an agreement with the Union to that effect. We do not believe that the ballot proposal denied in any way the unqualified recognition of the certified bargaining agent within the meaning of the Act.

The Board urges upon us the ruling in *N. L. R. B.* v. *Corsicana Cotton Mills*, 178 F. (2d) 344, C. A. 5th. In that case the employer insisted that the contract contain a provision to the effect that non-union employees should have a right to attend union meetings and to vote upon the provisions of the contract negotiated by the union as bargaining agent. The Court held that such insistence withheld recognition from

the Union as bargaining agent. The facts in that case go far beyond the present case. In that case the certified representative would have been unable to make *any* binding agreement with the employer, who as a practical matter would be dealing with all of the employees in agreeing upon the terms of the contract. In the present case, the non-union employees are permitted to express their views on only one phase of the contract, which was a matter of such vital importance as to justify an expression of their views.

The Company contends that the recognition proposal is also within the bargaining area, pointing out that Section 8 (d) of the Act defining the obligation to bargain collectively does not restrict it to conferring in good faith with respect to wages, hours and other terms and conditions of employment but includes "the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached. * * *" We do not think the Section is to be so broadly construed. Section 8 (a) (5), which imposes the duty of collective bargaining, is by its express terms tied in with Section 9 (a) which makes the designated representative the exclusive representative of the employees for the purpose of collective bargaining. This status is acquired by statute and is not within the area of collective bargaining. *N. L. R. B.* v. *Louisville Refining Co.*, 102 F. (2d) 678, 680–681, C. A. 6th, certiorari denied, 308 U. S. 568 * * *; *N. L. R. B.* v. *Deena Artware,* 198 F. (2) 645, 651, C. A. 6th, certiorari denied, 345 U. S. 906 * * *. Section 8 (d) must be construed in connection with Sections 8 (a) (5) and 9 (a). When so considered, the phrase "negotiation of an agreement, or any question arising thereunder" means the terms of the agreement rather than the party with whom the agreement is being negotiated.

The Company attempts to justify its position by pointing out that it at all times recognized the Union as the exclusive bargaining agent and did all of its bargaining with it as such agent. It contends that there is nothing in the Act which requires that after all issues have been agreed upon the written contract embodying the agreement must be made with the agent who negotiated the agreement. Although there is no specific provision to that effect, we believe it is clearly implied that the designated bargaining agent is the party with whom the contract is to be made unless it voluntarily relinquishes such right in favor of another. The collective bargaining contract is not the contract of employment. It is rather the trade agreement which controls the individual contracts of employment. *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332 * * . It is a strained construction of the Act to say that the party representing the employees and negiotiating such a trade agreement for their benefit is not entitled to complete the job by having the contract which it has negotiated executed with it as the representative of the individual employees for whom it is acting. Such a contract is necessarily executed with a representative of the individual employees. We fail to see the reasoning which would authorize the substitution of the Local, not the official representative of the employees, for the Union which is the official representative of the employees, over the objections of the Union. The fact that the Union offered to share this right with its Local did not give the Company the right to insist that it relinquish the right completely. The Company was not within its rights in insisting upon its proposal pertaining to this phase of the case.

While the strike was in progress the Company solicited its employees through newspaper and radio

advertising to return to work. It stressed the advantages to be derived by returning to work and the unreasonableness of the Union's demands. It offered free bus transportation for this purpose. Two Company foremen visited the Local's vice-president at his home for that purpose and suggested that an agreement might be arrived at "if the Local would forget the International." The Board ruled that such conduct violated Section 8 (a) (1) of the Act because it was an attempt to deal individually with the employees rather than with the Union and was reasonably calculated to undermine the Union. We recognize the rule urged upon us by the Company that communications with employees by an employer are protected under the First Amendment of the Constitution so long as such communications contain no threat of reprisal or promise of benefit. *N. L. R. B.* v. *Ford Motor Co.*, 114 F. (2) 905, 913–915, C. A. 6th, certiorari denied, 312 U. S. 689 * * *; *N. L. R. B.* v. *Cleveland Trust Co.*, 214 F. (2d) 95, 99, C. A. 6th. Under the rule the employer is free to say to his employees that he wishes to carry on production and, if the employees desire so to do, they may return to work. *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. (2d) 144, 153, C. A. 7th. For the purposes of this opinion, it is sufficient to say that in our opinion the communications complained of went beyond permissible limits. *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. (2) 676, 681, C. A. 9th * * *; *N. L. R. B.* v. *Clearfield Cheese Co.*, 213 F. (2d) 70, 72–83, C. A. 3rd; *N. L. R. B.* v. *James Thompson & Co.*, 208 F. (2d) 743, 748, C. A. 2nd; *May Department Stores Co.*, v. *N. L. R. B.*, 326 U. S. 376, 385 * * *.

The Company also advised its striking employees by newspaper advertisement and individual letters that their jobs were still open if they returned to work, that the Company was hiring new people every day

but would hold the jobs open until Monday, April 20, 1953, at which time it would start hiring replacements, and that setting a deadline for return was a necessary move in order to know who was returning and who was not. In a letter of April 15, 1953 it was said: "If you do not return, I wish you the best of success in your new job whatever and wherever it may be." In a letter of April 22, 1953, addressed to "Those Who Chose to Give Up Their Jobs at Wooster Division" the Company's President stated: "When you did not report for work on April 20, it became apparent that you had decided to give up your job here." The Board found this to be a violation of Section 8 (a) (1) of the Act in that it was an attempt to cause the employees to abandon the strike by unlawful threats of discharge.

There is authority to the effect that notice to a striking employee that he will lose his job unless he returns to work by a certain dead-line is an illegal discharge. *N. L. R. B.* v. *U. S. Cold Storage Corp.,* supra, 203 F. (2d) 924, 927, C. A. 5th, certiorari denied, 346 U. S. 818; *N. L. R. B.* v. *Beaver Meadow Creamery,* 215 F. (2d) 247, 252, C. A. 3rd; *N. L. R. B.* v. *Clearfield Cheese Co.,* supra, 213 F. (2d) 70, 72–73, C. A. 3rd. There are other cases which hold that where striking employees are subject to being replaced it is not an unfair labor practice to notify them that their jobs are available until a certain time at which time replacements will be sought. *Kansas Milling Co.* v. *N. L. R. B.,* 185 F. (2d) 413, 419–420, C. A. 10th; *N. L. R. B.* v. *Hart Cotton Mills,* 190 F. (2d) 964, 973, C. A. 4th; *N. L. R. B.* v. *Bradley Washfountain Co.,* supra, 192 F. (2d) 144, 153–154, C. A. 7th; *Rubin Bros. Footwear* v. *N. L. R. B.,* 203 F. (2d) 486, 487, C. A. 5th. This Court has also so ruled. *Ohio Associated Tel. Co.* v. *N. L. R. B.,* 192 F. (2d) 664, 667–668, C. A. 6th;

Shopmen's Local Union, etc. v. *N. L. R. B.*, 219 F. (2d) 874, C. A. 6th. In the present case, the newspaper advertisement stated—"We would prefer to have you return to your own job." The letter of April 15, 1953, contained the statement: "I sincerely hope you will return by Monday, April 20. You may be sure you will be most welcome." We do not consider the advertisement and letters with respect to replacements an unfair labor practice.

In dismissing so much of the complaint as sought reinstatement of 36 employees the Board found that the record failed to establish that the economic strikers were discriminated against with respect to their reinstatement, and that substantially all of the striking employees were eventually reinstated in accordance with a detailed plan worked out between the Company and the Local. This agreement, dated May 2, 1953, stated that the Company had 59 jobs available, which were not sufficient to take care of all striking employees. It divided the employees who had not returned to work into two classifications, (1) those whose jobs had not been replaced or for whom there were job openings, and (2) those whose jobs had been replaced or whose jobs had been eliminated. Under the specified procedure the available jobs were offered to those in the first classification before being made available for those in the second classification.

This method of reinstatement and its approval by the Board was based upon the Board's ruling that the strike was an economic one rather than an unfair labor practice strike. It is settled law that where the strike is an economic one the employer can replace the striking employees with others in an effort to carry on the business and is not required to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment. *N. L. R. B.* v.

Mackay Radio & Telegraph Co., 304 U. S. 333, 345–346 * * *. But he can not discharge economic strikers prior to the time their jobs are filled, or discriminate against them by reason of the strike in reinstating those whose jobs have not been filled. Sec. 2 (3) and (8) (a) (3) of the Act, Sec. 152 (3) and 158 (a) (3), Title 29, U. S. C. A. *N. L. R. B.* v. *U. S. Cold Storage Corp.*, supra, 203 F. (2d) 924, 927, C. A. 5th; *Hamilton* v. *N. L. R. B.*, 160 F. (2d) 465, 468–469, C. A. 6th.

However, if the strike is caused by an unfair labor practice, the striking employees are entitled to reinstatement upon termination of the strike. *N. L. R. B.* v. *Deena Artware*, supra, 198 F. (2d) 645, C. A. 6th; *N. L. R. B.* v. *Thayer Co.*, 213 F. (2d) 748, 752, C. A. 1st certiorari denied, 348 U. S. 883 * * *; *N. L. R. B.* v. *Pecheur Lozenge Co.*, 209 F. (2d) 393, 404–405, C. A. 2nd, certiorari denied, 347 U. S. 953 * * *. The Board found that the record did not establish by a preponderance of the evidence that the strike was caused by the Company's refusal to bargain rather than by a failure to reach agreement on the economic issues in dispute. This finding is vigorously challenged by the Union.

The main objective of the Union was to obtain for the Wooster Division employees the higher wages and benefits which it had previously obtained for the Pesco Division employees. The Union's first proposal was substantially what it had obtained in its Pesco contract. The Company's economic proposals were compared with the provisions of the Pesco contract and their shortcomings emphasized. Members of the Pesco Local attended union meetings. The Pesco Local pledged its support in the event of a strike. The Union's proposal on March 19, the day before the strike, listed 30 issues as still in dispute. During the strike Union bulletins and newspaper advertisements discussed the economic issues involved

without referring to the recognition clause. Inferences from proven facts may be drawn by the Board which differ from those drawn by the examiner. *N. L. R. B.*, v. *Wiltse*, 188 F. (2) 917, 925, C. A. 6th. Giving full consideration to the trial examiner's contrary view in accordance with the ruling in *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 492–497 * * * we think the evidence sustains a finding that the dispute over the economic issues was *a* cause of the strike.

The Union contends that in any event the unfair labor practice of the Company was a contributing cause of the strike which as a matter of law requires that the strike be treated as an unfair labor practice strike. That such is the legal consequence of such a factual situation appears settled. *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872, C. A. 2nd, certoriari denied, 304 U. S. 576 * * *; *N. L. R. B.* v. *A. Sartorius & Co.*, 140 F. (2d) 203, 206, C. A. 2nd; *N. L. R. B.* v. *Stilley Plywood Co.*, 199 F. (2d) 319, C. A. 4th. The burden rested upon the Company to show that the strike would have taken place even if it had not insisted upon its recognition proposal. *N. L. R. B.* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176, C. A. 3rd, certiorari denied, 308 U. S. 605. * * *. We do not construe the findings of the Board as including an express finding on this factual issue. Counsel for the Board apparently so concedes by his statement in the brief that "the Board in effect found" such to be the case. We agree with counsel for the Union that the Board's findings are inadequate with respect to this issue which is controlling on the question of reinstatement. The Union also challenges the validity of the agreement under which reinstatement was carried out. On these issues the case is remanded to the Board for further findings and rulings.

The order of the Board is modified by striking therefrom the words "and employee ballot proposals or any other proposals not involving conditions of employment" in paragraph 1 (b), the words "and threatening its employees with loss of employment unless they abandon the strike" in paragraph 1 (c), and the final paragraph dismissing so much of the complaint dealing with the alleged refusal of the Company to reinstate certain employees, with like modifications of the posted notice, and as so modified enforcement of the order is decreed. The case is remanded to the Board for further findings and rulings in accordance with the Court's opinion herein.

2. Judgment Below

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable National Labor Relations Board, *Greeting:*

Whereas, lately in the National Labor Relations Board before you or some of you, in *Matter of Wooster Division of Borg-Warner Corporation and International Union, United Automobile Aircraft & Agricultural Implement Workers of America, CIO* (Case No. 8–CA–830), a decision and order was entered on the 26th day of August 1955;

And whereas, the said National Labor Relations Board petitioned this court as appears by inspection of the transcript of record of the said National Labor Relations Board which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of a petition for enforcement agreeably in the Act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord, one thousand nine hundred and

fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed by this Court that the order of the National Labor Relations Board be and it is modified by striking therefrom the words "and employee ballot proposals or any other proposals not involving conditions of employment" in paragraph 1 (b), the words "and threatening its employees with loss of employment unless they abandon the strike" in paragraph 1 (c), and the final paragraph dismissing so much of the complaint dealing with the alleged refusal of the Company to reinstate certain employees, with like modifications of the posted notice, and as so modified enforcement of the order is decreed. The case is remanded to the Board for further findings and ruling in accordance with the Court's opinion herein.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said petition for enforcement notwithstanding.

WITNESS, the Honorable EARL WARREN, Chief Justice of the United States, the sixth day of November in the year of our Lord one thousand nine hundred and fifty-six.

CARL W. REUSS,
Clerk, United States Court of Appeals for the Sixth Circuit.

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